

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CAPTAIN HARTMUT RATHJE, et al.,)

)

Plaintiffs)

)

v.)

Civil No. 01-123-P-DMC

)

SCOTIA PRINCE CRUISES, LTD.,)

)

Defendant)

)

**MEMORANDUM DECISION ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT¹**

Defendant Scotia Prince Cruises, Ltd. (“SPC”), formerly known as Prince of Fundy Cruises, Ltd. (“POF”), moves for summary judgment as to the entirety of the complaint of former POF employees Hartmut Rathje, Kenth Persson and Rolf Sjöström. Defendant’s Motion for Summary Judgment, etc. (“Defendant’s Motion”) (Docket No. 7) at 1; *see generally* Verified Complaint in Admiralty and Prayer for Rule (C) Arrest (“Complaint”).² For the reasons that follow, the motion is granted in part and denied in part.

I. Applicable Legal Standards

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

² The Complaint names three defendants: POF and SPC *in personam* and the M/V SCOTIA PRINCE (“SCOTIA PRINCE”) *in rem*. Complaint at 1. All parties agree that, despite the caption in the Complaint, the only defendant and counterclaimant is SPC, formerly known as POF. Report of Final Pretrial Conference and Order (Docket No. 26) at 1 n.1. The named defendant vessel was never served or arrested. *Id.* Counterclaims brought by SPC against the plaintiffs, *see* Answer, Affirmative Defenses and Counterclaim of Defendant, Scotia Prince Cruises Limited, f/k/a Prince of Fundy Cruises Limited (Docket No. 2) at 6-12, are not in issue here.

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

As a threshold matter I address SPC’s motion to strike the entirety of the plaintiffs’ opposing statement of material facts, as well as its assertion that it need not respond to the substance of a supplemental statement of material facts. Defendant Scotia Prince Cruises Limited’s Reply Statement of Material Facts (“Defendant’s Reply SMF”) (Docket No. 36) at 2, 11; *see also* Plaintiff’s [sic]

Statement of Material Facts in Opposition to Defendants’ Motion for Summary Judgment (“Plaintiffs’ Opposing SMF”) (Docket No. 20); Plaintiffs’ Supplemental Statement of Material Facts in Opposition to Defendants’ Motion for Summary Judgment (“Plaintiffs’ Supp. SMF”) (Docket No. 29).

Turning first to the motion to strike, SPC complains that the Plaintiffs’ Opposing SMF violates Loc. R. 56 inasmuch as it is nonresponsive, lengthy and discursive, unduly burdensome to respond to and relies in part on allegations not based on admissible evidence. Defendant’s Reply SMF at 2. Although the plaintiffs do indeed fail to respond to SPC’s initial statement as required by Loc. R. 56(c), the appropriate sanction is to deem SPC’s facts admitted to the extent supported by record citations, in accordance with Loc. R. 56(e).³ While certain of the plaintiffs’ statements are lengthy and discursive, *see, e.g.*, Plaintiffs’ Opposing SMF ¶ 14, the document contains separately numbered paragraphs and is not so formless as to justify its disregard on this ground.⁴ To the extent SPC complains that the plaintiffs’ statements are based on inadmissible evidence, the asserted flaw is not so prevalent as to warrant striking the entire document; I instead consider these objections on a case-by-case basis as necessary. For these reasons, the motion to strike is denied.

With respect to the supplemental statement, SPC asserts that no substantive response is required inasmuch as the document is untimely, is based on the affidavit of the plaintiffs’ attorney, who cannot serve as a witness while representing the plaintiffs as counsel, and consists entirely of inadmissible hearsay – namely, the attorney’s retelling of a certain witness’s deposition testimony. Defendant’s Reply SMF at 11. I agree. The submission of a supplemental statement of fact is not contemplated by Loc. R. 56. The plaintiffs attempt to justify the filing on the ground that “subsequent

³ Although the striking of the plaintiffs’ entire statement is unwarranted, I remind counsel of the affirmative obligation, in responding to a statement of material facts, to admit, deny or qualify each statement. Failure to do so imposes the type of needless burden on the court that Loc. R. 56 was designed to obviate.

⁴ The plaintiffs’ statement nonetheless is hardly a model to emulate. Paragraphs and sentences should be kept as short as possible, with each sentence ideally followed by a record citation (including, where appropriate, “*id.*”).

to the time in which to file an Opposition, the Plaintiffs took the De Bene Esse Deposition of Carsten Brueninghaus.” Plaintiffs’ Supp. SMF at 1. That circumstance – together with an explanation as to why the referenced deposition could not have been taken earlier – may have been cited in support of a motion for leave to file a supplemental statement, but no such motion was filed, and such a statement cannot be filed without the court’s express permission. In any event, the document in question is based on inadmissible hearsay: the plaintiffs’ attorney’s representation of what Brueninghaus testified to at deposition, which is offered for the truth of the matter asserted. *See* Supplemental Affidavit of Michael X. Savasuk in Opposition to Defendants’ Motion for Summary Judgment (Docket No. 30) ¶ 2 (“[S]ince [Brueninghaus’] deposition transcript is not ready at this time, I am providing information regarding his testimony and Exhibits.”); Fed. R. Evid. 801(c) (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”); *Ambrose v. New England Ass’n of Sch. & Colleges, Inc.*, 252 F.3d 488, 497 (1st Cir. 2001) (“Warding off summary judgment requires nonmovants to produce materials of evidentiary quality[.]”). Inasmuch as the supplemental statement is not cognizable on summary judgment, SPC properly ignored its substance.

With the foregoing issues resolved, the parties’ statements of material facts, credited to the extent either admitted (in some cases only for purposes of summary judgment) or supported by record citations in accordance with Loc. R. 56, reveal the following relevant to this decision:

The SCOTIA PRINCE is and at all relevant times was registered in Panama. Defendant Scotia Prince Cruises Limited’s Statement of Material Facts (“Defendant’s SMF”) (Docket No. 8) ¶ 1; Affidavit of Jay Frye (“Frye Aff.”) (Docket No. 9) ¶ 2. The SCOTIA PRINCE is operated seasonally as a ferry between Portland, Maine, and Yarmouth, Nova Scotia, by SPC, a Bermuda-operated corporation with a principal place of business in Hamilton, Bermuda. Defendant’s SMF ¶ 2; Frye Aff.

¶ 3.⁵ During the ferry season, which runs from late April to late October, the SCOTIA PRINCE typically spends only one hour a day, for loading and unloading, at the International Ferry Terminal in Portland. Defendant's SMF ¶ 3; Frye Aff. ¶ 4.⁶

The SCOTIA PRINCE is owned by TransWorld Steamship Company (PANAMA) ("TransWorld"), which is a Panamanian corporation with no place of business or office in the United States. Defendant's SMF ¶ 4; Frye Aff. ¶ 5. SPC charters the SCOTIA PRINCE from TransWorld pursuant to a bareboat charter. Defendant's SMF ¶ 5; Frye Aff. ¶ 6. During the off-season, when the SCOTIA PRINCE is not operating, it has been berthed outside the United States, usually at a berth in Nova Scotia. Defendant's SMF ¶ 6; Frye Aff. ¶ 7. During such time, various crew members stay with the vessel to provide necessary services and maintenance. *Id.*

Rathje is a citizen of the country of Sweden; he signed on as captain of the SCOTIA PRINCE in July 1983 pursuant to a written contract with POF. Defendant's SMF ¶ 7; Complaint ¶¶ 1, 8. Persson is a citizen of the country of Sweden and signed on as an engineering officer of the SCOTIA PRINCE pursuant to a written contract with POF. Defendant's SMF ¶ 9; Complaint ¶¶ 2, 9. Sjöström is a citizen of the country of Sweden and signed on as chief engineer of the SCOTIA PRINCE pursuant to a written contract with POF. Defendant's SMF ¶ 11; Complaint ¶¶ 3, 10.

All three contracts provide, *inter alia*, that

⁵ The parties' statements of material fact do not clarify when POF changed its name to SPC; however, the company apparently continued to operate as POF at least through the time of the plaintiffs' separation from employment. *See, e.g.,* Plaintiffs' Opposing SMF ¶ 38.

⁶ The plaintiffs further assert that POF has been registered to do business as a foreign corporation in the State of Maine since March 1982. Plaintiffs' Opposing SMF ¶ 39. However, as noted by SPC, the document on which the plaintiffs rely is neither certified under seal nor otherwise properly authenticated (attorney Savasuk not representing that he is a custodian of such records) and thus is inadmissible. *See* Defendant's Reply SMF ¶ 39; Affidavit of Michael X. Savasuk in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Docket No. 31) ¶ 2 & Exh. A thereto; *see also, e.g., Elgabri v. Lekas*, 964 F.2d 1255, 1261 (1st Cir. 1992) ("Even if we assume that the letter was part of his application file, Dr. Elgabri failed to produce a qualified witness or custodian of records to authenticate the letter as a business record."); *United States v. Robinson-Munoz*, 961 F.2d 300, 305 (1st Cir. 1992) (document certified under seal met definition of self-authenticating document pursuant to Fed. R. Evid. 902(1)).

the articles of agreement of the country where the above vessel is registered form part of this contract of employment. I also confirm that no oral promises than [sic] the terms and conditions of this contract has been given to me. Therefore, I cannot claim any additional benefits or wages of any kind (except) those which have been provided in this contract.

Agreement dated April 29, 1983 between Prince of Fundy Cruises Limited and Hartmut Rathje (“Rathje Contract/SPC Version”), attached as Exh. A to Defendant’s SMF; Agreement dated January 17, 1983 between Prince of Fundy Cruises Limited and Kenth Persson, attached as Exh. B to Defendant’s SMF; Agreement dated October 22, 1997 between Prince of Fundy Cruises Limited and Rolf G. Sjöström, attached as Exh. C to Defendant’s SMF.

After the 1996 season Sjöström was promoted from chief engineer to superintendent. Defendant’s SMF ¶ 19; Deposition of Rolf Sjostrom [sic] (“Sjöström Dep.”), filed with Defendant’s Motion, at 5-6. Thereafter, Sjöström worked on the vessel as chief engineer only one month, in July, each year. Defendant’s SMF ¶ 20; Sjöström Dep. at 6, 12-13.⁷ Sjöström’s most recent seaman’s contract dated October 22, 1997 calls for compensation for his services as chief engineer at the rate of \$6,380 per month. Defendant’s SMF ¶ 21; Sjöström Dep. at 20-21. Under a second agreement, also dated October 22, 1997, Sjöström’s compensation as superintendent was 294,000 Swedish krona per year on a twelve-month basis. Defendant’s SMF ¶ 22; Sjöström Dep. at 27; Agreement dated October 22, 1997 between Prince of Fundy Cruises Limited and Rolf G. Sjöström (“Sjöström Superintendent Contract”), attached as Exh. 3 to Sjöström Dep. However, he did not receive any of that compensation from POF. Defendant’s SMF ¶ 22; Sjöström Dep. at 18-19; Agreement dated January 1, 2001 between Prince of Fundy Cruises Limited and Plus 2 Ferryconsultation AB (“Plus 2”), attached as Exh. 4 to Sjöström Dep. Rather, from 1997 through 2000 he received his salary from a company called Marine Trading, and thereafter he received his salary from Plus 2. *Id.*

⁷ Although Sjöström in fact worked no more than one month per year as chief engineer, the 1997 contract refers to a six-month period (*continued on next page*)

As superintendent, Sjöström worked ashore out of offices in Sweden. Defendant's SMF ¶ 23; Sjöström Dep. at 19; Plaintiffs' Opposing SMF ¶¶ 2-3; Affidavit of Rolf Sjostrom [sic] in Support of Plaintiff's [sic] Opposition to Defendants' Motion for Summary Judgment (Docket No. 22) ¶¶ 2-3. After POF severed its relationship with Marine Trading in 2000, Sjöström, starting in January 2001, went to work for and rented an office from Plus 2, a company owned by the former co-owner of Marine Trading. Defendant's SMF ¶ 23; Sjöström Dep. at 15-16, 18, 39. Sjöström earned income as chief engineer not in the United States but, rather, on board the Panamanian vessel, and was always paid that income on board the vessel. Defendant's SMF ¶ 25; Sjöström Dep. at 29. In contrast, he received his compensation for his superintendent's duties in Sweden. *Id.*

Rathje's contract contained a three-month notice of termination. Plaintiffs' Opposing SMF ¶ 1; Agreement dated [illegible] between Prince of Fundy Cruises Limited and Hartmut Rathje ("Rathje Contract/Plaintiffs' Version"), attached as Exh. A to Affidavit of Hartmut Rathje in Support of Plaintiff's [sic] Opposition to Defendants' Motion for Summary Judgment ("Rathje Aff.") (Docket No. 23).⁸ Sjöström's superintendent contract had a nine-month notice of termination, which was required by both parties. Plaintiffs' Opposing SMF ¶ 2; Sjöström Superintendent Contract.

Persson's contract states that the notice time for termination of employment is two months. Plaintiffs' Opposing SMF ¶ 4; Agreement dated January 9, 1984 between Prince of Fundy Cruises

of employment as such. Defendant's SMF ¶ 24; Sjöström Dep. at 7, 27.

⁸ SPC contends that the plaintiffs' version of the Rathje contract "contains handwritten changes (including the three-month notice of termination provision) that were not initialed or otherwise approved by Defendant's president." Defendant's Reply SMF ¶ 1. Although the plaintiffs submit a version of the Rathje contract that differs from that offered by SPC, the handwritten three-month notation is the same in both. *Compare* Rathje Contract/Plaintiffs' Version *with* Rathje Contract/SPC Version. Moreover, the testimony of Henk Pols on which SPC relies does not specifically identify the notice of termination provision or indicate that the changes were not "otherwise approved." Deposition of Henk Pols ("Pols Dep."), filed with Defendant Scotia Prince Cruises Limited's Reply Memorandum in Support of Its Motion for Summary Judgment ("Defendant's Reply") (Docket No. 35), at 9, 12. In any event, to the extent the parties dispute the validity of the handwritten three-month notation, I view the facts in the light most favorable to the plaintiffs, as non-movants, for purposes of summary judgment.

Limited and Kenth Persson (“Persson Contract/Plaintiffs’ Version”), attached as Exh. B to Rathje Aff.⁹

On November 11, 1997 POF issued a letter, to whom it may concern, stating that Persson was employed as First Engineer aboard the SCOTIA PRINCE, that his employment was not limited in time and that the parties had agreed to a “2 months[’] mutual notice.” Plaintiffs’ Opposing SMF ¶ 5; Letter dated November 11, 1997 from Henk A. Pols to Whom It May Concern, attached as Exh. C to Rathje Aff.

In August 2000 Professor Matthew Hudson bought out POF. Plaintiffs’ Opposing SMF ¶ 7; Rathje Aff. ¶ 6.¹⁰ At about this time Rathje communicated to Henk Pols, president of POF, that there was some question regarding the future of the company and that in order to retain the officers there should be a review with modifications to earnings and relief systems. Plaintiffs’ Opposing SMF ¶¶ 2, 7; Rathje Aff. ¶¶ 2, 6. Pols later advised Rathje that he approved of the modifications recommended by Rathje for all deck and engine officers aboard the SCOTIA PRINCE. Plaintiffs’ Opposing SMF ¶ 8; Defendant’s Reply SMF ¶ 8. Pols also advised Rathje that Hudson was aware of these modifications and approved of them. *Id.* As a result, Rathje communicated by letter to all officers and engineers aboard the vessel advising them of the good news that their contracts would be modified effective November 1, 2000. *Id.*

In March 2001 the plaintiffs all arrived on board the vessel and began preparing her for the upcoming season. *Id.* ¶ 10. The plaintiffs sailed the vessel from Shelburne to Portland, Maine, arriving on April 3, 2001. *Id.* ¶ 12. After the vessel arrived in Portland, the hotel manager and chief

⁹ SPC attempts to deny this statement, asserting that the plaintiffs’ version of the Persson contract “contains handwritten and typed-in changes that were not initialed or otherwise approved by Defendant’s president,” Defendant’s Reply SMF ¶ 4; however, the testimony upon which SPC relies concerns only handwritten changes, not typed-in changes, *see* Pols Dep. at 8-11. The notice of termination in issue was typed in. *See* Persson Contract/Plaintiffs’ Version.

¹⁰ I note – although the dispute is immaterial to resolution of the instant motion – that SPC denies that Hudson individually bought out POF. Defendant’s Reply SMF ¶ 7; Deposition of Professor [Matthew] Hudson (“Hudson Dep.”), filed with Defendant’s Motion, at 9-11.

purser, among others, were dismissed from their employment. Plaintiffs' Opposing SMF ¶ 12; Rathje Aff. ¶ 10.¹¹

On the evening of April 4, 2001 Hudson, who was now chairman of POF, met with the plaintiffs aboard the vessel. Plaintiffs' Opposing SMF ¶¶ 13-14; Rathje Aff. ¶¶ 11-12.¹² Hudson advised the plaintiffs that he had some good news and some bad news. Plaintiffs' Opposing SMF ¶ 14; Rathje Aff. ¶ 12. He said the bad news was that he had fired the vice president and the director of marketing. *Id.* The plaintiffs were stunned. *Id.*; Sjöström Dep. at 29-33.¹³ The vice president had been working for the company for more than thirty years, and the director of marketing for more than twenty years. Plaintiffs' Opposing SMF ¶ 14; Rathje Aff. ¶ 12. There had been no prior indications or warnings that these individuals were going to be dismissed. *Id.*

Hudson advised the three plaintiffs that POF was going to hire a company called International Shipping Partners ("ISP") to undertake manning and purchasing functions for the vessel. Defendant's SMF ¶ 28; Hudson Dep. at 16-18, 21-22; Complaint ¶¶ 12-13. Rathje specifically asked Hudson whether the manning company would also be involved in management, and Hudson said "no, only manning." Plaintiffs' Opposing SMF ¶ 14; Rathje Aff. ¶ 12.

Hudson assured the plaintiffs that their employment would be "ring-fenced," by which he meant, and the plaintiffs understood, that their own jobs would be secure and their contracts would not be modified in any way, notwithstanding the engagement of ISP. Defendant's SMF ¶ 29; Hudson Dep.

¹¹ SPC objects to allegations concerning the dismissal of other employees on the ground of lack of proper foundation, Defendant's Reply SMF ¶ 12; however, there is no reason to doubt that the captain of the vessel would have had personal knowledge of this particular information.

¹² SPC denies the plaintiffs' version of what happened at this meeting, apart from Hudson's promise to ring-fence their contracts. Defendant's Reply SMF ¶ 14. The portion of Hudson's testimony upon which SPC relies is not inconsistent with the plaintiffs' story in all particulars, *see* Hudson Dep. at 24-27; however, to the extent the two clash, I accept the plaintiffs' version for purposes of summary judgment.

¹³ SPC protests that Rathje's testimony as to what "the plaintiffs" felt is inadmissible hearsay as to Persson and Sjöström and subject to exclusion for lack of personal knowledge on Rathje's part, Defendant's Reply SMF ¶ 14; *see also id.* ¶¶ 16, 18; however, one reasonably can infer that Rathje personally witnessed facial expressions or other physical manifestations of his co-plaintiffs' reactions. *(continued on next page)*

at 24; Rathje Dep. at 47; Persson Dep. at 29. Hudson told the plaintiffs that he wanted them to continue their employment. Defendant's SMF ¶ 30; Hudson Dep. at 24; Persson Dep. at 41; Sjöström Dep. at 31. Rathje stated that inasmuch as the people who worked at POF had been there for many years, he (the captain) would have to include them in the ring-fencing. Plaintiffs' Opposing SMF ¶ 14; Rathje Aff. ¶ 12.¹⁴ Hudson said ISP's new conditions would apply only to new hires. *Id.* The evening ended on a positive note. *Id.*

POF entered into a written contract with ISP on April 5, 2001. Defendant's SMF ¶ 31; Hudson Dep. at 24, 28. At a meeting that morning Hudson introduced three individuals as being from ISP, which had taken over not only manning but also technical management and purchasing for the vessel. Plaintiffs' Opposing SMF ¶¶ 15-16; Rathje Aff. ¶¶ 13-14. The plaintiffs were again stunned. Plaintiffs' Opposing SMF ¶ 16; Rathje Aff. ¶ 14; Sjöström Dep. at 33-34. This essentially meant that Sjöström's job was obsolete. *Id.* However, POF was not firing Sjöström from his job. Defendant's Reply SMF ¶ 16; Hudson Dep. at 24, 29.

After the plaintiffs met with ISP, Hudson reconfirmed that their contracts would be ring-fenced. Defendant's SMF ¶ 30; Hudson Dep. at 24; Rathje Dep. at 60; Persson Dep. at 36. He never told Rathje that he intended to replace Rathje or suggested that Rathje should resign. Defendant's SMF ¶ 30; Rathje Dep. at 130. Nor did he ever tell Persson that any changes would be made to his contract. Defendant's SMF ¶ 30; Persson Dep. at 41.

During a later meeting between the plaintiffs and ISP, Sten Jansson, a chief engineer with ISP, talked to Rathje privately. Plaintiffs' Opposing SMF ¶ 17; Rathje Aff. ¶ 15. Jansson told Rathje that Rathje had to understand that payment for all ISP ships is the same for each position, so that the ring-

His report of those reactions thus is made on personal knowledge and does not constitute inadmissible hearsay.

¹⁴ Rathje was concerned that the increase in pay that had been approved in November 2000 would be rescinded after he had already confirmed it via correspondence. Plaintiffs' Opposing SMF ¶ 14; Rathje Aff. ¶ 12.

fencing of the plaintiffs would not work with ISP. *Id.* At that meeting, Captain Bergquist of ISP later approached Rathje. Plaintiffs' Opposing SMF ¶ 18; Rathje Aff. ¶ 16. He began to explain that ISP was a manning company and that if it had to pay the wages being paid to the officers and crew currently on board the vessel, it would not even get a job. *Id.* Bergquist showed the plaintiffs ISP's present wages, compared with the wages then in place on the vessel, and indicated that the plaintiffs and the present officers were busting ISP's budget. *Id.* Rathje believed that ISP was not aware of the ring-fencing promise and verbal commitment by Hudson the prior evening, nor of Hudson's commitment to the modifications to the other officers' and crew's pay scale and vacation that had been agreed to in November 2000. *Id.* Rathje was very upset given the prior commitments and agreements, which he believed were being rescinded by POF, its president and chairman. *Id.*¹⁵

Thereafter, the plaintiffs communicated via e-mail with Hudson. Plaintiffs' Opposing SMF ¶ 19; Rathje Aff. ¶ 17. On April 5, 2001 the plaintiffs sent Hudson an e-mail giving him an ultimatum: either break the contract with ISP or the plaintiffs would leave their employment. Defendant's SMF ¶ 33; Persson Dep. at 42. The gist of the e-mail was, "It is either them or us." Defendant's SMF ¶ 33; Rathje Dep. at 72. Hudson viewed this communication as the plaintiffs' resignation, which he accepted. Defendant's SMF ¶ 34; Persson Dep. at 42; E-mail dated April 7, 2001 from Professor M.C. Hudson, Exh. 8 to Hudson Dep. at 4. The plaintiffs advised Hudson that they had not resigned, but considered themselves terminated. Plaintiffs' Opposing SMF ¶ 20; Letter dated April 7, 2001 from H, K, R to Professor M.C. Hudson, attached as Exh. F to Rathje Aff., at 8. Rathje never found out what ISP was going to do on the ship or what changes would result. Defendant's SMF ¶ 32; Rathje Dep. at 59, 71.

¹⁵ SPC denies that POF's commitments to or agreements with the plaintiffs were in fact being rescinded. Defendant's Reply SMF ¶ 18; Hudson Dep. at 22, 24, 28-29.

After POF accepted the plaintiffs' resignations, the parties negotiated what the plaintiffs would be paid. Defendant's Reply SMF ¶ 20; Rathje Dep. at 132-33. Although Hudson stated from the outset that he was not obliged to pay the plaintiffs anything, he was willing to negotiate with them. Defendant's Reply SMF ¶ 20; Rathje Dep. at 134. However, the negotiations ultimately broke down. Defendant's Reply SMF ¶ 20; Rathje Dep. at 135.¹⁶

The plaintiffs' last day of employment was April 19 or 20, 2001. Defendant's SMF ¶ 35; Rathje Dep. at 5; Persson Dep. at 50-51; Sjöström Dep. at 4. The plaintiffs were each paid in full through April 20, 2001, and Rathje and Persson acknowledged in writing that they had been paid all amounts due and owing through April 20, 2001. Defendant's SMF ¶ 36; Rathje Dep. at 135; Persson Dep. at 51. Sjöström acknowledged that he was paid all amounts due and owing through April 30, 2001, even though his last day of employment was April 20th. Defendant's SMF ¶ 36; Acknowledgement dated April 22, 2001 by Rolf Sjöström, attached as Exh. 6 to Sjöström Dep. Sjöström does not claim that he is owed any sums as chief engineer. Defendant's SMF ¶ 37; Sjöström Dep. at 54. His wage claim is based solely on whatever contractual rights he had as superintendent. *Id.*

III. Discussion

The plaintiffs bring two claims against SPC: breach of employment contract (specifically, wrongful termination) and violation of a Maine wage statute, 26 M.R.S.A. § 626. Complaint ¶ 14.¹⁷

¹⁶ I agree with SPC that in view of the foregoing, those portions of the plaintiffs' statement of facts setting forth the contents of the settlement negotiations (*i.e.*, communications after April 7, 2001 touching on this subject matter) are inadmissible. *See* Defendant's Reply SMF ¶¶ 20-24; *Hiram Ricker & Sons v. Students Int'l Meditation Soc'y*, 501 F.2d 550, 553 (1st Cir. 1974) ("It is, of course, true that evidence of settlement negotiations is generally inadmissible.") Although there are exceptions to this rule of inadmissibility, including, *inter alia*, instances in which such evidence is offered to prove breach of a settlement agreement, *see, e.g., Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293 (6th Cir. 1997), no such claim is made in this case, *see generally* Complaint.

¹⁷ At a telephone conference of counsel held on December 18, 2001 at my initiative to clarify the scope of the plaintiffs' claims, counsel for the plaintiffs contended that they assert a wage-related claim under 46 U.S.C. § 10313 on the strength of the general prayer for relief included in the Complaint. Report of Conference of Counsel (Docket No. 43) at 2. This purported claim was (*continued on next page*)

SPC seeks summary judgment as to the first claim on the basis that the plaintiffs were not terminated, but rather resigned. Defendant's Motion at 6. It argues that, in any event, summary judgment should be entered in its favor as to plaintiff Sjöström in view of certain admissions he made. *Id.* at 10. With respect to the Maine wage statute, SPC contends that it is entitled to summary judgment on two alternative grounds: that the plaintiffs resigned (rather than being terminated) and that the statute should not be accorded extraterritorial effect. *Id.* at 7-10. I am not persuaded that SPC is entitled to summary judgment on the breach of contract claim (even as to Sjöström); however, I agree that the Maine wage statute is inapplicable in the circumstances of this case.

A. Breach of Contract

Turning first to the breach-of-contract claim, SPC argues that the plaintiffs' ultimatum to Hudson constituted a resignation inasmuch as "[a] resignation with an 'unless' clause is still a resignation" and that SPC's refusal to accede to that ultimatum "did not convert their resignations into discharges." *Id.* at 6.¹⁸ Under the circumstances, in SPC's view, it possessed a unilateral right to waive the notice period, which it chose to do. *Id.* SPC accordingly reasons that the plaintiffs had no right to receive compensation for their respective notice periods. *Id.* The plaintiffs counter that, rather than resigning, they were effectively terminated. Plaintiffs' Opposition at 5. They argue that, in any event, regardless whether they resigned or were discharged, they were entitled to receive compensation through their respective notice periods. *Id.* at 6-8.

mentioned for the first time in the plaintiffs' final pretrial memorandum, filed subsequent to the Defendant's Motion. *See id.* at 1. The claim was neither acquiesced in by SPC, *see id.* at 2, properly pleaded in the first instance nor made the subject of a motion to amend. Nor was it raised prior to the filing of the Defendant's Motion, depriving the defense of a reasonable opportunity to respond. Accordingly, I decline to treat it as part of the Complaint. *See, e.g., Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995) ("At a bare minimum, even in this age of notice pleading, a defendant must be afforded both adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense.")

¹⁸ Both parties assume, without discussion, that in the context of the breach-of-contract claim, American admiralty law applies. *See* Defendant's Motion at 5-7; Plaintiff's [sic] Memorandum in Support of Their Opposition to Defendant's Motion for Summary Judgment ("Plaintiffs' Opposition") (Docket No. 19) at 5-8. I therefore do likewise.

I do not reach the latter issue inasmuch as I find that the plaintiffs adduce sufficient evidence to raise a genuine issue of material fact as to whether they resigned. Specifically, a trier of fact crediting the plaintiffs' version of events could find that even though Hudson had promised them that their jobs would be ring-fenced, he had made other promises that were not kept (*i.e.*, that ISP's new conditions would apply only to new hires); that ISP, which was placed in charge of manning and management, indicated it could not afford the ring-fenced contracts, raising a serious question whether the ring-fencing promise would be kept; and that, seemingly in direct contradiction with that promise, Sjöström's job functions as superintendent were completely eliminated. In those circumstances the plaintiffs – who did not give an official, unequivocal notice of resignation in accordance with the terms of their contracts – might reasonably have considered themselves effectively discharged. SPC hence is not entitled to summary judgment on the basis that the plaintiffs resigned.

SPC next contends that, in any event, it is entitled to summary judgment as to Sjöström with respect to the breach of contract claim inasmuch as Sjöström concedes that (i) he is owed no money in his capacity as chief engineer and (ii) he received compensation for his superintendent services solely from Plus 2 (a non-party). Defendant's Motion at 10. Tellingly, SPC does not argue that Plus 2 was Sjöström's employer – and, in fact, the employment contract that Sjöström claims was breached runs between POF and Sjöström. *See* Sjöström Superintendent Contract. SPC accordingly is not entitled to summary judgment as to Sjöström on this ground.

B. Maine Wage Statute (26 M.R.S.A. § 626)

SPC seeks summary judgment as to the plaintiffs' Maine wage claim (26 M.R.S.A. § 626) on the basis, *inter alia*, that application of the statute in this case would constitute an impermissible extraterritorial extension of Maine law. Defendant's Motion at 7-10. I agree.

The parties do not cite, nor can I find, caselaw dealing with the question whether a state wage statute applies to foreign seamen employed by a foreign employer to staff a foreign-flag ship that happens to be operated, at least in part, from that state's ports.¹⁹ The plaintiffs press the court to employ an eight-factor choice-of-law test designed to ferret out the state with the most significant contacts to a given claim. Plaintiffs' Opposition at 8-9 (citing *Cacho v. Prince of Fundy Cruises, Ltd.*, 722 A.2d 349 (Me. 1998)). SPC argues that the most-significant-contacts test, employed in *Cacho* in the context of a Jones Act and general maritime law claim arising from personal injury to a foreign seaman, is inapposite in this wage-dispute context. Defendant's Reply at 4; *Cacho*, 722 A.2d at 350. In SPC's view, in cases such as this the so-called "law of the flag" governs, and the presumption against extraterritorial application of state statutes applies. Defendant's Motion at 8-9; Defendant's Reply at 5. SPC has the better of the argument.

The Supreme Court has described the law of the flag as a "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21 (1963); see also *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981) (noting, in context of criminal case, "The law of the flag theory holds that a ship is constructively a floating part of the flag-state, that it is deemed to be part of the territory whose flag it flies and that the state has jurisdiction over offenses committed aboard the ship.").

Labor-relations issues fairly can be described as implicating the internal affairs of a vessel. See, e.g., *McCulloch*, 372 U.S. at 20 (noting, in declining to apply the National Labor Relations Act to foreign crew and vessel, "we find no basis for a construction which would exert United States

¹⁹ The plaintiffs cite several cases for the proposition that "it has been held that State labor laws apply to seamen unless they actually conflict with federal law or interfere with the application of federal principles," Plaintiffs' Opposition at 10; however, none of these cases concerns foreign crew or vessels. See *Lipscomb v. Foss Maritime Co.*, 83 F.3d 1106 (9th Cir. 1996); *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270 (1st Cir. 1993); *Pacific Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990); *Crowley v. Old River Towing Co.*, 664 F. Supp. 1008 (E.D. La. 1987); *Sewell v. M/V Point Barrow*, 556 F. Supp. 168 (D. Alaska 1983).

jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag”); *Brooks v. Hess Oil V.I. Corp.*, 809 F.2d 206, 208 n.2 (3d Cir. 1987) (observing, in case involving claims of Liberian-flag ship crew members for overtime pay pursuant to collective-bargaining agreement, “We see no logical reason to conclude that at some arbitrary point the number of American contacts outweighs the rule that the law of the flag controls the internal order and economy of foreign flag vessels, and accordingly we decide this case under Liberian law without reference to the various provisions of American labor law urged by plaintiffs.”).

Inasmuch as, for purposes of seamen’s wage disputes, a foreign-flag ship is considered foreign soil, a single question remains: whether Congress (or, in the case of a state statute, that state’s legislature) expressed a clear intent that the statute in question have extraterritorial reach.²⁰ Congress is presumed not to intend the extraterritorial operation of United States statutes absent a clear expression to the contrary. *See, e.g., McCulloch*, 372 U.S. at 21-22 (noting that “for us to sanction the exercise of local sovereignty under such conditions in this delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed”) (citation and internal quotation marks omitted). In like vein, state statutes are presumed not to have extraterritorial reach. *See, e.g., Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) (“We begin our analysis with the well-established presumption against extraterritorial operation of statutes. That is, unless a contrary intent appears within the language of the statute, we presume that the statute is meant to apply only within the territorial boundaries of the [relevant state].”); *Arizona Commercial Mining*

²⁰ The Supreme Court in *McCulloch* clarified that a balancing-of-contacts type of analysis, although potentially relevant in contexts such as Jones Act cases “where the pervasive regulation of the internal order of a ship may not be present,” was inappropriate in the context of the union-representation dispute before it, noting: “The question . . . appears to us more basic; namely, whether the [National Labor Relations] Act as written was intended to have any application to foreign registered vessels employing alien seamen.” *McCulloch*, 372 U.S. at 19 & n.9; compare, e.g., *Walters v. Prince of Fundy Cruises, Ltd.*, 781 F. Supp. 811 (D. Me. 1991) (applying eight-factor choice-of-law test in Jones Act and general maritime law case arising from injury to foreign seaman). This case is closely enough analogous to *McCulloch* that the balancing test is inappropriate here, as well.

Co. v. Iron Cap Copper Co., 119 Me. 213, 223 (1920) (“[A] remedy provided by statute will not be given extra territorial effect unless such effect is within the contemplation of the act.”).

The Maine statute in question provides in relevant part, “An employee leaving employment must be paid in full within a reasonable time after demand at the office of the employer where payrolls are kept and wages are paid[.]” 26 M.R.S.A. § 626. Nothing within the statute expresses an intent to apply its substance extraterritorially, *id.*, nor do the plaintiffs point to anything evincing such an intent. Compare, e.g., *Su v. M/V Southern Aster*, 978 F.2d 462, 468 (9th Cir. 1992) (observing that jurisdictional provision within the Wage Act, 46 U.S.C. § 10313(i), “makes clear that foreign seafarers discharged in an American port may invoke the Act’s protections”).

The Maine legislature having expressed no clear intent to apply the statute in issue extraterritorially, it is inapplicable in this case.

IV. Conclusion

For the foregoing reasons, the Defendant’s Motion is **GRANTED** as to the plaintiffs’ claim pursuant to 26 M.R.S.A. § 626, and otherwise **DENIED**.

Dated this 20th day of December, 2001.

David M. Cohen
United States Magistrate Judge

TRIAL STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-123

RATHJE, et al v. SCOTIA PRINCE CRUISE, et al

Filed: 05/01/01

Assigned to: MAG. JUDGE DAVID M. COHEN

Demand: \$300,000

Nature of Suit: 120

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:1333 Admiralty

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